

# Northwestern Journal of International Human Rights

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Volume 8 | Issue 3

Article 2

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Summer 2010

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### Recommended Citation

Göran Sluiter, *Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law*, 8 NW. J. INT'L HUM. RTS. 248 (2010).  
<http://scholarlycommons.law.northwestern.edu/njihr/vol8/iss3/2>

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# **Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law**

**Göran Sluiter\***

## **I. INTRODUCTION**

¶1 The year 2009 has been in many respects spectacular for international criminal justice. Looking back on each of the past ten to fifteen years one has the impression that it is hardly possible that more developments take place than in the previous year, but we are always proven wrong. It seems that each year tops the previous one in terms of creation of new institutions, abundance of case law and legislative efforts. This in spite of the fact that the big ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) have been engaged in their respective completion strategies for quite a few years. But new experiments in international criminal justice, such as the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) and the Special Tribunal for Lebanon (“STL”), and the growing body of jurisprudence of the International Criminal Court (“ICC”) make up for any reduced (investigative) activity of the UN ad hoc Tribunals.

¶2 A full overview of all interesting developments in the year 2009 would by far exceed a reasonably sized paper. Furthermore, there exist excellent and more frequently appearing overviews of developments in international criminal justice, to which I gladly refer the interested reader.<sup>1</sup> I have thus decided to make a selection. Guiding me in this selection are the problems in securing adequate protection of human rights in the international criminal justice system. We are increasingly encountering incidents and situations,

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\* Professor in the law of international criminal procedure.

<sup>1</sup> See, e.g., the ‘Highlights’ section in the Journal of International Criminal Justice and also the regular discussions of case law in the Leiden Journal of International Law.

which seriously raise the question whether the strong interest in effective prosecution tends to override the minimum standards of due process.

## II. THE RIGHT TO BE TRIED WITHOUT UNDUE DELAY<sup>2</sup>

¶3

It is known that the periods within which persons indicted by the ICTY and ICTR are tried are sometimes disconcertingly long. These periods run from the moment of arrest until finalization of all proceedings.<sup>3</sup> While the ICTY has experienced its share of long proceedings,<sup>4</sup> the most extreme cases can be found at the ICTR. After preceding case law where the ICTR Appeals Chamber had established that periods of approximately eight years did not amount to a violation of the right to be tried without undue delay,<sup>5</sup> the ICTR Trial Chamber was confronted at the end of 2008 with the question

<sup>2</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, Art. 21(4)(c), UN SCOR, 48th Sess., 3217th Mtg. at 1-2, U.N. Doc. S/Res/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Art. 20(4)(c), UN SCOR 49th Sess., 3453d Mtg., U.N. Doc. S/Res/955 (Nov. 8, 1994); Rome Statute of the International Criminal Court, Art. 67(1)(c), U.N. Doc. A/CONF. 183/9 (July 17, 1998); Statute of the Special Court for Sierra Leone, Art. 17(4)(c), U.N. Doc. S/2002/246, Appx. II (Jan. 16, 2002). This right is protected by other international agreements as well. International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21, Art. 14(3)(c), U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1996); European Convention on Human Rights, Art. 6(1), ETS 5 (Nov. 4, 1950); American Convention on Human Rights, OAS Treaty Series No. 36, Art. 8(1) (Nov. 11, 1969).

<sup>3</sup> See *Kangasluoma v. Finland*, 2004 Eur. Ct. H.R. 29, ¶ 26 (“the period to be taken into account in the assessment of the length of the proceedings starts from an official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence or from some other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect”).

<sup>4</sup> For example, the first accused at the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), Dusko Tadić, was arrested in February 1994 in Germany, for crimes related to the Omarska camp. *Prosecutor v. Tadic*, Case No. IT-94-1-A and IT-94-1-Abis, ¶ 2 Judgement in Sentencing Appeals (January 26, 2000). The final judgement was issued approximately six years later. *Id.* It must be mentioned, however, that the period between his arrest and his first conviction was a little over three years. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgement (May 7, 1997).

<sup>5</sup> *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeals Judgement, ¶¶ 1076-1077 (November 28, 2007).

whether the accused in *Prosecutor v. Bagosora* (“Military I”) received adequate protection from this right.<sup>6</sup> The accused had suffered from eleven and twelve years of detention until their cases were decided in first instance; at present, they are all engaged in appeal proceedings and it cannot be said when the proceedings will be finalized and what the totality of the period ultimately will be.

¶4

These aforementioned periods may seem unacceptable to every reasonable observer. Twelve years of trial duration and pre-trial detention—in a context where the average life expectancy is 54.1 years<sup>7</sup>—is absolutely shameful. As to the law, the reasoning proffered by the Trial Chamber is unconvincing and leaves the reader with the uncomfortable feeling that an upper limit for the duration of a trial may never be established at the international level. If twelve years won’t do it, maybe fifteen, maybe twenty; we simply do not know. The reasoning adopted by all ICTR Chambers makes maximum use of all the flexible variables included in the law on “trial without undue delay” in such a manner that any result can be justified.

¶5

It may be necessary to set out the basic parameters under international human rights law to determine undue delay. No specific time-limit exists, and the reasonableness will clearly depend on the circumstances of the case, having regard to the complexity of the case, the conduct of the accused, and the conduct of the relevant authorities.<sup>8</sup> The latter is in fact the most important factor.<sup>9</sup> The highly flexible nature of this assessment has resulted in human rights case law where an apparently short duration produced a violation, whereas an apparently very long duration was regarded as lawful. The flexible nature of the right is further illustrated by the opportunity for states to avoid liability for a violation when the affected person is compensated for the excessive length, in the form of an adequate reduction of the sentence.<sup>10</sup>

<sup>6</sup> See *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Judgement (Dec. 18, 2008).

<sup>7</sup> UN Data: Life Expectancy at Birth, Both Sexes Combined for Rwanda (2015-2020), <http://data.un.org/Data.aspx?d=PopDiv&f=variableID%3A68> (last visited June 20, 2010).

<sup>8</sup> See, e.g., *Philis v. Greece*, 1997 Eur. Ct. H.R. 34, ¶ 35. See also *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, ICTR, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and For Stoppage of Proceedings (May 23, 2000) (adopting same criteria).

<sup>9</sup> STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 146 (2005).

<sup>10</sup> *Id.* at 148.

¶6 The Trial Chamber in Military I committed at least four discernable errors in its treatment of the matter.

¶7 First, it repeated the mistake made by the ICTR Appeals Chamber, which rejected a comparison with time frames in domestic criminal courts, because they were found “not particularly persuasive given the inherent complexity of international proceedings.”<sup>11</sup> In its reasoning, the Trial Chamber did not refer to international human rights case law and resorted to a self-referential analysis, in which apparently it was a small step from eight years as reasonable to twelve years as reasonable. What one expects from the Chamber is an application of human rights law as minimum standards to the situation at hand. Clearly, the complexity of proceedings can serve to prolong the duration of the reasonable period, but this must be properly explained and certainly complexity can never serve to justify delays *ad infinitum*.

¶8 Second, it follows from the Chamber’s reasoning that in determining the period as reasonable the complexity of the proceedings was a decisive consideration.<sup>12</sup> Interestingly, the complexity of proceedings is dealt with as a given, for which apparently no one is to blame. This is naive and wrong. The Prosecutor can be held responsible in two ways for trials of extreme duration. At the beginning, he carries significant responsibility for delays by submitting indictments in a system that is incapable of handling them within a reasonable period of time. Furthermore, the complexity of prosecutions is the direct result of prosecutorial choices, namely the selection of charges.

¶9 Third, if the delay cannot be attributed to a specific party, as the Trial Chamber in Military I established,<sup>13</sup> this cannot be a ground to ignore violations of individual rights. As ruled in *Barayagwiza*, sharing of fault between organs of the tribunal should not affect the application of fundamental rights.<sup>14</sup>

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<sup>11</sup> Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgement, ¶ 80 (citing Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeals Judgement, ¶¶ 1076-77 (Nov. 28, 2007)).

<sup>12</sup> Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgement, ¶¶ 78 – 82.

<sup>13</sup> *Id.* ¶ 82.

<sup>14</sup> Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision, ¶ 73 (Nov. 1999).

¶10 Fourth, the Trial Chamber made the puzzling finding that they could not identify any prejudice caused by the delay with respect to the two accused who received life sentences.<sup>15</sup> This is inconsistent with the presumption of innocence and the principle that the reasonable duration of the trial must be assessed independently. Furthermore, it is a mistake to find that the accused suffered no prejudice; they clearly did, as they had to wait eleven and twelve years before knowing the (provisional) outcome of their case.

¶11 The Trial Chamber's decision on the duration of the trial does a disservice to proper respect of human rights norms. It ignores the function of the ICTR as a role model for criminal proceedings and creates the risk that national courts can justify lengthy proceedings by referring to the practice of the ICTR. It is my view that a violation of the right had to be established; at the very least, a proper analysis had to be conducted, indicating what the reasonable limits for the duration of trials are. The Trial Chamber could have easily expressed its discomfort and could have determined that a violation of the right to be tried without undue delay had occurred, without this having to have far-reaching consequences. Remedies could have been confined to an appropriate reduction of the sentence imposed.

### III. THE RIGHT TO EFFECTIVE REPRESENTATION

¶12 The ICTY Appeals Chamber pronounced its judgment in the Krajišnik case on March 17, 2009; the accused was sentenced to twenty years of imprisonment.<sup>16</sup> An important element of the appeals was the accused's claim that he received ineffective representation for a very large part of the trial proceedings, which allegedly violated his fair trial rights.<sup>17</sup> It was not the first time the Appeals Chamber was confronted with claims of ineffective representation by counsel. It happened in the cases of Tadić,<sup>18</sup>

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<sup>15</sup> Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgement, ¶ 83.

<sup>16</sup> See Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgement, (Mar. 17, 2009).

<sup>17</sup> *Id.* ¶ 395.

<sup>18</sup> See Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, (Oct. 15, 1998); Prosecutor v. Tadić, Case No. IT-94-1-R, Decision on Motion for Review (July 30, 2002).

Akayesu,<sup>19</sup> and Blagojević.<sup>20</sup> The applicable test for ineffective representation was set out in Akayesu:

77. With respect to the applicable tests for assessing counsel's ineptitude, the Appeals Chamber endorses the tests applied by ICTY Appeals Chamber in the *Tadić* Decision. In this regard, ICTY Appeals Chamber held that an Appellant alleging incompetence of counsel must show the "gross incompetence" of the latter. The Appellant may do so by "demonstrat[ing] that there was reasonable doubt as to whether a miscarriage of justice resulted." Indeed, "(...)when evidence was not called because of the advice of the defence counsel in charge at the time, it cannot be right for the Appeals Chamber to admit additional evidence in such a case, even if it were to disagree with the advice given by counsel. The unity of identity between client and counsel is indispensable to the workings of the International Criminal Tribunal. If counsel acted despite the wishes of the Appellant, in the absence of protest at the time, and barring special circumstances which do not appear, the latter must be taken to have acquiesced ..."

78. In other words, the Statute of the Tribunal affords an indigent accused the right to be represented by a competent counsel. The latter is presumed to be competent and such a presumption of competence can only be rebutted by evidence to the contrary. In most cases, the accused would have to show prejudice as set out in the above-mentioned *Tadić* Decision and should such prejudice be proven, the Appeals Chamber would have to acknowledge that the right of the Accused as guaranteed under the Statute had been violated. However, even if such prejudice is not proven the question remains, as to whether the proven incompetence constitutes a violation of the statutory right of the accused to assistance by competent counsel and would consequently warrant a remedy.<sup>21</sup> (footnotes omitted)

¶13

The combined standard of "gross incompetence" and on that basis "demonstrat[ing] that there was reasonable doubt as to whether a miscarriage of justice resulted" seems quite high and unreasonable, for at least two reasons. First, lying at the foundation of this test is the assumption of competent counsel. But lacking

<sup>19</sup> See Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgement (June 1, 2001).

<sup>20</sup> Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-A, A. Ch., Judgement (May 9, 2007).

<sup>21</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Sentencing Judgement, ¶ 77-8 (June 1, 2001).

proper selection and training mechanisms, to mention just two, the ICTY and ICTR simply cannot guarantee competence of counsel to the same degree as a well-functioning domestic criminal justice system. Second, it has never been properly explored by the ICTY and ICTR how their standard relates to human rights law and standards developed in adversarial criminal justice systems. The adversarial-based standard, employed in such states as the United States, is relevant to the ICTY and ICTR, which by and large follows an adversarial procedural system.

¶14

In international human rights law we are confronted with two slightly diverging standards. In the context of the European Convention of Human Rights (“ECHR”) national authorities only have to intervene “if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.”<sup>22</sup> “Manifest ineffective representation” is not easily established, as counsel acting against the wishes of his client is not necessarily considered to be ineffective.<sup>23</sup> In death penalty cases—which concerns the International Covenant on Civil and Political Rights (“ICCPR”)—a more demanding standard has been adopted; the state has a positive duty to ensure that the legal assistance provided is effective.<sup>24</sup>

¶15

At the national level, it is worth referring to U.S. case law. In the United States, according to *Strickland v. Washington*, the “proper standard for [measuring] attorney performance is that of reasonably effective assistance” as guided by “prevailing professional norms” and consideration of “all the circumstances” relevant to counsel’s performance.<sup>25</sup>

<sup>22</sup>Kamasinski v. Austria, App. No. 9783/82, Eur. Comm’n H.R. Dec. & Rep. 65 (1989) (available at <http://www.echr.coe/int/eng>).

<sup>23</sup>*Id.* ¶ 70.

<sup>24</sup>Views of the Human Rights Committee Under Art. 5, Para. 4 of the Optional Protocol to the International Covenant of Civil and Political Rights, Jam., July 15, 1996, CCPR/C/57/D/537/1993. See *Kelly v. Jamaica*, Communication 537/1993, Views adopted on 17 July 1996, UN Doc. CCPR/C/57/D/537/1993 and Communication No. 355/1989, Views adopted on 8 July 1994, UN Doc. CCPR/C/51/D/355/1989 (1994).

<sup>25</sup>*Strickland v. Washington*, 466 U.S. 668 (1984). The major conclusions of that landmark decision concerning effective representation can be summarized as follows:

(a) to establish ineffective assistance requiring reversal of a conviction, a defendant must show both



¶16

The problem with all ICTY and ICTR case law in respect to the right to effective representation, as an essential ingredient of the right to a fair trial, is that its own standard has never been explained or justified in light of human rights case law and relevant national case law (i.e. case law in adversarial criminal justice systems). The international jurisprudence is, again, highly self-referential. It is my view that the standard of effective representation developed and applied by the ICTY and ICTR is too high in relation to other relevant standards, especially given that the ICTY and ICTR offer no credible guarantees for the assumption of competence. Although the death penalty is not an available punishment in international criminal justice, all cases deal with extremely serious accusations, which may lead to the most serious penalties. Under these circumstances, it seems logical to adopt the ICCPR standard applicable to death penalty-cases, namely the positive duty incumbent upon the ICTY to ensure that legal assistance is effective. Simply too much is at stake.

¶17

The problems in respect of finding an appropriate standard are very well illustrated by the Krajišnik case. Interestingly, the Appeals Chamber went some way in agreeing with Krajišnik that the assistance he received from counsel was ineffective. It acknowledged that the work product handed over from the first to second counsel “was not in as good a state as it should have been,”<sup>26</sup> that there was insufficient preparation of the Defence team at the beginning of the trial,<sup>27</sup> and that the Defence’s review of the

- 
- (i) that counsel made errors so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment, and
  - (ii) that the deficient performance prejudiced the defense;
  - (b) the ‘proper standard for [measuring] attorney performance is that of reasonably effective assistance’, as guided by ‘prevailing professional norms’ and consideration of ‘all the circumstances’ relevant to counsel’s performance;
  - (c) more specific guidelines in applying that standard are not appropriate; and
  - (d) the proper standard for measuring prejudice is whether there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would be different. WAYNE LAFAYE *ET AL.*, CRIMINAL PROCEDURE, (3rd Ed. 2007) at 635 (For a detailed analysis of the law concerning ineffective representation see 635–46).

<sup>26</sup> Krajišnik, Judgement, *supra* note 16, ¶ 47.

<sup>27</sup> *Id.* ¶ 54.

disclosure material was imperfect.<sup>28</sup> Throughout its analysis the Appeals Chamber ruled that no gross negligence was established and/or no miscarriage of justice occurred. It failed, however, to substantiate those findings. It would be particularly interesting to learn what type of ineffective representation *would* amount to gross negligence and *would* occasion a miscarriage of justice. Indeed, the observer is left with the impression that Krajišnik has suffered significant prejudice from ineffective representation. What is more, the Appeals Chamber deals with instances of ineffective representation separately, but does not consider properly their combined effect.

¶18

One cannot help wondering whether the completion strategy has anything to do with dismissal of what appears a fairly solid and legitimate appellate ground. Clearly, in case of acceptance, a new trial would be necessary, causing serious delay. The concerns expressed by Judge Hunt in relation to effects of the completion strategy are worth citing:

21. The international community has entrusted the Tribunal with the task of trying persons charged with serious violations of international humanitarian law. It expects the Tribunal to do so in accordance with those rights of the accused to which reference is made in the previous paragraph. If the Tribunal is not given sufficient time and money to do so by the international community, then it should not attempt to try those persons in a way which does not accord with those rights. In my opinion, it is improper to take the Completion Strategy into account in departing from interpretations which had earlier been accepted by the Appeals Chamber where this is at the expense of those rights.

22. This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials. The Majority Appeals Chamber Decision and others in which the Completion Strategy has been given priority over the rights of the accused will leave a spreading stain on this Tribunal's reputation.<sup>29</sup>

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<sup>28</sup> *Id.* ¶ 63.

<sup>29</sup> ICTY, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence-In-Chief in the Form of Written Statements, Prosecutor v. Milošević, Case No. IT-02-54-AR73.4, A. Ch. (October 21 2003), ¶¶ 21, 22.

#### IV. “FIGHTING IMPUNITY” AS AN INTERPRETATIVE TOOL OF SOURCES OF INTERNATIONAL CRIMINAL LAW

¶19 In 2009 we have seen two ICC Appeals Chamber decisions which reveal a dangerous trend in interpretative methodology of key instruments of international criminal justice, i.e. statutes of international criminal tribunals. As I will demonstrate below, the aim of international criminal tribunals to put an end to impunity has been attributed a prominent place in the interpretation of statutes and other relevant sources of international criminal law. Indeed, the object and purpose of statutes, applying the Vienna Convention on the Law of Treaties, are important factors in getting to the correct interpretation of provisions.<sup>30</sup> But if the fight against impunity is taking on an important dimension in interpretative questions, one can easily imagine that interpretations in favour of effective prosecution loom on the horizon. This will especially be the case when interpretative rules used in criminal justice, such as the rule of lenity and the *maxim in dubio pro reo* which favour the accused, are insufficiently taken into account to counterbalance a predisposition towards effective prosecution.

¶20 There is an increasing concern of a significant pro-prosecution bias in international criminal justice. Darryl Robinson has offered highly interesting observations about how this can be explained:

In a typical criminal law context, liberal sensitivities focus on constraining the use of the state’s coercive power against individuals. In ICL, however, prosecution and conviction are often conceptualized as the fulfilment of the victims’ human right to a remedy. Such a conceptualization encourages reliance on human rights methodology and norms. This shift in conceptualization also shifts the preoccupation of participants in the system. Many traditionally liberal actors (such as non-governmental organizations or academics), who in a national system would vigilantly protect defendants and potential defendants, are among the most strident pro-prosecution voices, arguing for broad definitions and modes of liability and for

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<sup>30</sup> The cardinal rule of treaty interpretation is set out in Article 31(1) of the Vienna Convention on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Vienna Convention on the Laws of Treaties, May 23, 1969 art. 31(1) 1155 U.N.T.S. 331.

narrow defences, in order to secure convictions and thereby fulfil the victim's right to justice. Whereas in a national system one may hear that it is preferable to let ten guilty persons go free rather than to convict one innocent person, the ICL literature seems to strike the balance rather differently, replete as it is with fears that defendants might "escape conviction" or "escape accountability" unless inculcating principles are broadened further and exculpatory principles narrowed.<sup>31</sup> (footnotes omitted)

¶21 While the pro-prosecution bias can thus be explained, a mature justice system requires that judges take care in resisting such temptation. In the interpretation and application of the law they thus have to refrain from using a methodology that is clearly the result of and strengthens such bias.

¶22 The first decision revealing a pro-prosecution biased interpretation is the Appeals Chamber's ruling on Katanga's admissibility challenge.<sup>32</sup> In determining the proper interpretation of Article 17(1) of the ICC Statute—how it relates to situations of inaction—the Appeals Chamber used the fifth and fourth paragraphs of the Rome Statute as a basis for a "purposive interpretation" of the Statute.<sup>33</sup> This purposive interpretation did not seem to produce direct negative results for the accused, because the matter was concerned with adequate division of cases among the ICC and national justice systems. But one can easily imagine how the emphasis on ending impunity can result in interpretations prejudicial to the accused.

¶23 An example where this could have taken place is the Appeals Chamber's decision on Regulation 55. On December 8, 2009, the ICC Appeals Chamber issued its judgement on the changes to the legal characterisation of the facts—pursuant to Regulation 55 (2)—

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<sup>31</sup> Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. OF INT'L L. 925, 930-931 (2008).

<sup>32</sup> Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07 OA 8, Judgement on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (2009).

<sup>33</sup> *Id.* ¶ 79.

in the Lubanga case.<sup>34</sup> Regarding the interpretations of Article 61(9) of the Statute and Regulation 55,<sup>35</sup> the Appeals Chamber stated:

The Appeals Chamber is not persuaded by the interpretation of article 61(9) of the Statute put forward by Mr Lubanga Dyilo. First, the Appeals Chamber recalls that article 61(9) addresses primarily the powers of the Prosecutor to seek an amendment, addition or substitution of the charges, at his or her own initiative and prior to the commencement of the trial; the terms of the provision do not exclude the possibility that a Trial Chamber modifies the legal characterisation of the facts on its

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<sup>34</sup> Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/07 OA 8, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, (July 14, 2009) (hereinafter Lubanga Judgement).

<sup>35</sup> These provisions read as follows:

Article 61 (9): After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

Regulation 55: 1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e). Rome Statute of the International Criminal Court, 37 I.L.M 1002 (1998), 2187 U.N.T.S. 90.

own motion once the trial has commenced. Regulation 55 fits within the procedural framework because at the confirmation hearing, the Prosecutor needs only to "support each charge with sufficient evidence to establish substantial grounds to believe," whereas during trial, the onus is on the Prosecutor to prove "guilt beyond reasonable doubt." Thus, in the Appeals Chamber's view, article 61(9) of the Statute and Regulation 55 address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible. Second, the Appeals Chamber notes that Mr Lubanga Dyilo's interpretation of article 61(9) of the Statute bears the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at the trial. This would be contrary to the aim of the Statute to "put an end to impunity" (fifth paragraph of the Preamble). The Appeals Chamber is of the view that a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute.<sup>36</sup> (footnotes omitted)

¶24

The result of the proceedings on appeal was favourable to the accused, as the Trial Chamber's interpretation of Regulation 55, allowing it to add new facts and circumstances not described in the charges, was ruled to be incompatible with Article 61(9) of the Statute. But this does not alter the fact that in its interpretation of the Statute the Appeals Chamber referred to "risks of acquittal" and again uses the fight against impunity as an important interpretative tool. This is an accident waiting to happen. Once this sets in as "firm case law," it is open to Chambers to use vague connotations like the fight against impunity to creatively mould the Statute. I propose that these preambular sections, which explain and underlie the creation of the ICC, no longer receive interpretative importance. Rather, it is recommended that "delivering justice" guides the Chambers in their interpretation of the Statute. Unfortunate references to "risks of acquittals" are less likely to be reproduced when the neutral object and purpose of "delivering justice" replaces the "fight against impunity."

#### V. PERSISTING PROBLEMS IN SECURING THE RIGHT TO LIBERTY

¶25

One of the weakest aspects in terms of human rights law in the functioning of international criminal tribunals is the right to liberty. The law of the ICTY and ICTR has been defective for a

<sup>36</sup> Lubanga, Judgement, *supra* note 34, ¶ 77.

long time and still is. Rule 65 (B) of these Tribunals stipulated for a considerable number of years that “[r]elease may be ordered by a Trial Chamber only in exceptional circumstances...,” turning human rights law on its head, according to which liberty is the rule and detention the exception.<sup>37</sup> The Rule was amended for the ICTY in 1999 and has removed the reference to exceptional circumstances. Still, the law is flawed. Rule 65 deals with provisional release and puts the burden of proof in these applications on the defendant. It takes detention thus as the starting point. In the Statute and Rules there are no conditions for the issuance of warrants for arrest and detention, except that sufficient evidence exists.<sup>38</sup> Thus, the Prosecutor does not have to prove any grounds justifying detention, such as the risk of flight. Rather, the burden of proof lies with the defendant, in the context of an application for provisional release, to satisfy the Chamber that he will appear for trial and, if released, will not pose a danger to any victim, witness or other person. This reversal of the burden—viewed in the absence of initial determination that grounds justifying arrest exist<sup>39</sup>—violates human rights law. From the case-law of the European Court of Human Rights it follows that a person charged with an offence must always

<sup>37</sup> Article 9(3) of the ICCPR stipulates that it shall not be the general rule that persons awaiting trial shall be detained in custody. See on that provision General Comment 08 (16) of the Human Rights Committee (A/37/40 (1982) Annex V (at 95–6): “Pre-trial detention should be an exception and as short as possible.” International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967).

<sup>38</sup> Article 19 of the ICTY Statute governs this procedure:

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial. S.C. Res. 808, ¶ 98, U.N. Doc. S/RES/808 (May 3, 1993).

<sup>39</sup> The following grounds are recognized justifications for detention in case law from the European Court of Human Rights: the risk that the accused will fail to appear for trial; the risk that the accused would take action to prejudice the administration of justice or commit further offences or cause public disorder; and the risk that release may give rise, by reason of the particular gravity of the accusations and public reaction to them, to a social disturbance. *Letellier v. France*, App. No. 12369/86 Eur. Comm’n H.R. Dec. & Rep. ¶ 35 (1991).

be released pending trial unless the state can show that there are relevant and sufficient reasons to justify continued detention.<sup>40</sup>

¶26

The law of the ICC is a strong improvement compared to the law of the ICTY and ICTR on habeas corpus. At least two elements must be mentioned. First, contrary to the law of the ICTY and ICTR, the ICC Statute puts the burden of proof on the Prosecutor to not only satisfy the Chamber that there exists sufficient evidence justifying arrest and detention, but also that the arrest appears necessary for specific reasons.<sup>41</sup> Second, the ICC Statute contains better safeguards for periodical review of detention and for ensuring that a person is not detained for an unreasonable period prior to trial.<sup>42</sup>

¶27

In light of this improved system it seems logical that the issue of almost automatic pre-trial detention is approached more critically by ICC Chambers. Indeed, the ICC Pre-Trial Chamber, acting through Single Judge Trendafilova, decided in the Bemba

<sup>40</sup> *Smirnova v. Russia*, App. No. 46133/99 and 48183/99 Eur. Comm'n H.R. Dec. & Rep., ¶ 59 (2003).

<sup>41</sup> *See* Rome Statute of the International Criminal Court art. 58(1) ("At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
  - (i) To ensure the person's appearance at trial;
  - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
  - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances").

<sup>42</sup> *Id.* art. 60 (3)-(4) ("3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions").



case that the defendant should be conditionally released.<sup>43</sup> The Decision paid proper respect to applicable human rights law:

35. The Single Judge wishes to recall that article 60(3) of the Statute, as any other statutory provision, must be interpreted and applied in accordance with internationally recognized human rights, as provided for in article 21(3) of the Statute. The right of an arrested person to have access to a judicial authority vested with the power to adjudicate upon the lawfulness and justification of his or her detention is enshrined in many international human rights instruments, such as article 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights, article 5 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, article 6 of the African Charter on Human and Peoples' Rights and article 7 of the American Convention on Human Rights.

36. The Single Judge further recalls the 14 April 2009 Decision in which she stressed that "when dealing with the right to liberty, one should be mindful of the fundamental principle that deprivation of liberty should be an *exception* and not a rule (emphasis added).

37. The Single Judge wishes to clarify that this fundamental principle, a corollary of the presumption of innocence provided in article 66 of the Statute, continues to be the guiding principle upon which the present review is based.

38. The Single Judge also emphasizes that pre-trial detention is not to be considered as pre-trial punishment and shall not be used for punitive purposes. The Single Judge's task is to weigh up and balance the factors presented to her, mindful of the particular circumstances of each individual case.<sup>44</sup> (footnotes omitted)

¶28

In a principled, and in my view correct, approach to detention on remand, the Single Judge decided on the examination

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<sup>43</sup> Pre-Trial Chamber II, *Situation in the Central African Republic*, Prosecutor v. Bemba, ICC-01/05-01/08-475, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa (Aug. 14, 2009) [hereinafter Bemba Decision].

<sup>44</sup> *Id.* ¶¶ 35-38.

of the facts that the detention of Mr. Bemba appeared no longer necessary:

In conclusion, the Single Judge holds that the continued detention of Mr. Jean-Pierre Bemba does not appear necessary to ensure his appearance at trial in accordance with article 58(1)(b)(i) of the Statute. The Single Judge also concludes that the continued detention is not necessitated by the other two alternatives encapsulated in article 58(1)(b)(ii) and (iii) of the Statute. Recalling that the decision on continued detention or release is not of a discretionary nature, and mindful of the underlying principle that deprivation of liberty is the exception and not the rule, the Single Judge decides that Mr. Jean-Pierre Bemba shall therefore be released, albeit under conditions.<sup>45</sup>

¶29 But the Single Judge determined “that the implementation of this decision is deferred pending a decision by the Chamber on the set of conditions to be imposed on Mr. Jean-Pierre Bemba, the state to which he is to be released and all necessary arrangements have been put in place.”<sup>46</sup>

¶30 The decision from the Single Judge was overturned by the Appeals Chamber.<sup>47</sup> Its judgement demonstrates that international criminal tribunals, in spite of improvements in the applicable law, still fail to come to grips with the right to liberty. The following flaws taint the judgement:

¶31 First, contrary to the Single Judge, the Appeals Chamber does not seem to address this issue in light of the superior position of human rights law in the Court’s applicable law, as set out in Article 21(3) of the ICC Statute. No reference is made to the essential principles of the right to liberty or human rights (case) law.

¶32 Second, one notices that the Appeals Chamber attributes significant importance to the “... length of sentence that Mr. Bemba is likely to serve if convicted on these charges ...” as an incentive for him to abscond.<sup>48</sup> Such considerations are inappropriate. They

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<sup>45</sup> *Id.* ¶ 77.

<sup>46</sup> *Id.* ¶ 78.

<sup>47</sup> The Appeals Chamber, *Situation in the Central African Republic*, Prosecutor v. Bemba, ICC-01/05-01/08-631 OA 2, Judgement on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa” (Dec. 2, 2009)[hereinafter Bemba Judgement].

<sup>48</sup> *Id.* ¶ 70.

are inconsistent with the presumption of innocence and may unduly influence trial judges in the determination of the sentence. Furthermore, it is firmly established in human rights case law that pre-trial detention cannot be based on anticipation of a lengthy sentence of imprisonment.<sup>49</sup>

¶33

Third, the Appeals Chamber is on a wrong and dangerous track when it imposes as a condition for a decision granting interim release the prior identification of a state that is willing and able to accept the person concerned.<sup>50</sup> It did not elaborate on this and did not, for example, explain the meaning of “able and willing.” It seems to follow from reference to dependence upon state cooperation that the Appeals Chamber regards this as a non-mandatory form of cooperation.<sup>51</sup> As a result, the compliance with fundamental human rights norms in the functioning of the ICC is made completely dependent upon whether or not a state agrees to accept a person who is eligible for release. The respect of fundamental human rights norms cannot be made conditional upon such highly uncertain factors. The Appeals Chamber does not embark upon an analysis of the inevitable consequences of this position; should we infer from this finding that even in the most serious violations of the right to liberty a person will not be released if not accepted by a state? The Single Judge adopted a better approach:

The Single Judge emphasizes that the decision on interim release ultimately rests with the Single Judge, who is mandated to examine the prerequisites for any deprivation of liberty, based on the law exclusively and the specific circumstances of the case. The fact that States may have not provided guarantees cannot weigh heavily against Mr Jean-Pierre Bemba's release. Neither are conditions of "guarantees" proposed by the States a prior indispensable requirement for granting interim release; rather they provide assurance to the Single Judge.<sup>52</sup>

¶34

What is missing in both instances, but especially in the Appeals Chamber decision, is an adequate analysis of and answer to the questions of whether and how State Parties must cooperate with

<sup>49</sup> Letellier v. France, 207 Eur. Ct. H.R. (ser. A) ¶ 35 (1991).

<sup>50</sup> See Bemba Judgement, *supra* note 47, ¶ 106.

<sup>51</sup> See *id.* ¶ 107.

<sup>52</sup> Bemba Decision, *supra* note 43, ¶ 88 (internal citations omitted).

the Court in ensuring protection of the right to liberty. The Single Judge emphasized the existence of the duty to cooperate for State Parties set out in Part 9, with Article 86 as the general provision, and also rightly mentioned that this duty concerns the entire Statute, including Part 5.<sup>53</sup> But with the hearing on implementation of the decision still to be held, the Single Judge did not determine the existence of a duty for (certain) states to cooperate in the interim release of Mr. Bemba. The Appeals Chamber, regrettably, refrained from any reference to Part 9; we can conclude, as was already mentioned, that it does not consider assistance in the protection of the right to liberty to fall within the ambit of the ICC's cooperation regime. This follows, among other things, from the importance attached by the Appeals Chamber to Rule 119(3), obliging the Chamber to seek the views of relevant states before conditional release is ordered.<sup>54</sup> But it is a non-sequitur, when the Appeals Chamber infers from this procedural obligation that a "willing State" must be identified prior to a decision on conditional release.<sup>55</sup> There is no basis for this interpretation provided and, painfully, it is not put into the proper context of duties of states under Part 9.

¶35

It is my view that Part 9 should not be restricted to effective assistance in investigations and prosecutions. Such emphasis, again, creates the risk of pro-prosecution bias. The duty of states to cooperate includes all matters related to investigations and prosecutions, especially when non-cooperation entails the violation of human rights. This interpretation of Article 86—and other Articles in Part 9—is not only preferable, it is also obligatory pursuant to Article 21(3) of the Statute. Furthermore, the specific situation of assisting in interim release is governed by Article 93. The chapeau of Article 93(1) makes reference to "assistance *in relation* to investigations or prosecutions."<sup>56</sup> There can be no doubt that assistance in respect of Bemba's interim release is related to the Court's prosecution. It must be acknowledged that assistance in release is not specifically provided for in Article 93, and therefore has to be accommodated under the residual clause, Article 93(1)(l).<sup>57</sup>

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<sup>53</sup> *Id.* ¶¶ 85-86.

<sup>54</sup> *See* Bemba Judgement, *supra* note 47, ¶ 106.

<sup>55</sup> *Id.*

<sup>56</sup> Rome Statute of the International Criminal Court art. 93 (emphasis added).

<sup>57</sup> *Id.* art. 93(1)(l) ("Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court").

Although this provision refers to “facilitating the investigation and prosecution,” an interpretation in light of the obligation set out in Article 21(3) can have no other result than that State Parties must cooperate with the Court in ensuring the right to liberty.

¶36

From a practical perspective, the question arises as to which state should be targeted with this obligation. Especially when the state of arrest or residence is not an obvious choice, because of political instability or inability to supervise conditions of detention, alternatives have to be considered. One of these alternatives could be the state party where (direct) relatives reside. A few words need to be said about the role of the host state, the Netherlands, in assisting international criminal tribunals in protecting the right to liberty. The host state has shown persistent reluctance in accepting conditionally released individuals on its territory.<sup>58</sup> Regrettably, it has never offered its services to ensure proper protection of the right to liberty by institutions functioning on Dutch territory. But it needs to be borne in mind that Article 5 of the ECHR and Article 9 of the ICCPR impose obligations on the Netherlands, which, at a very minimum, require it to engage constructively with the ICC in ensuring the protection of the right to liberty of individuals present on Dutch territory.

## VI. CONCLUDING OBSERVATIONS

¶37

We have witnessed many spectacular developments in international criminal justice in 2009. In this contribution I have selected the developments that should give rise to concern. Based on a number of decisions in 2009, human rights protection remains the Achilles heel of international criminal justice. The trend remains undeniably pro-prosecution, both in respect of the interpretation of the law in general, and in respect of concrete human rights. For a system that should be growing in maturity it is disappointing that this trend is so tenacious and that little progress seems to be made. Maybe this is because the pro-prosecution bias is so much at the heart of the international criminal justice system. To improve this,

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<sup>58</sup> In respect to the ICTY, the host State has expressed regular concern that the provisionally-released accused lacks an adequate residence permit for the Netherlands. See JOHN R.W.D. JONES & STEVEN POWLES, *INTERNATIONAL CRIMINAL PRACTICE* 609-10 (Ardsley, New York: Transnational Publishers 2003).

and to preserve the legitimacy of the international criminal justice system in the long run, I have three concrete recommendations.

¶38 First, the “fight against impunity” or “closing the impunity gap” must be abolished or severely restricted as an interpretive tool. Instead, delivering justice should guide judges in their interpretation of the law.

¶39 Second, international criminal tribunals must take human rights seriously. This implies that the law and case law of international human rights courts must be followed. Any deviation must be exceptional and based on convincing arguments. Furthermore, such deviation cannot, by definition, result in less protection.

¶40 Third and finally, it is worth seriously exploring the possibility of external supervision of international criminal tribunals for their compliance with human rights law. For any justice system, including the international criminal justice system, however perfect it may be, external checks, with the necessary distance, are vital.